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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 639

L. J. BLAKEY (Successor to R. E. Schumacher), Receiver of the First National Bank of New Bern, New Bern, North Carolina, Petitioner,

vs.

CHARLES J. BRINSON, Respondent.

BRIEF OF PETITIONER.

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INDEX.

Subject Index.

Brief for petitioner:	Page
I. Opinions below	1
II. Jurisdiction	2
III. Statement of the case	2
IV. Specification of errors	5
V. Summary of argument	6
VI. Argument	7
A. A preferred claim should not be allowed respondent Brinson because the required elements of trust relationship, augmentation of assets of the bank, and tracing of trust property to the receiver, did not exist	7
1. The necessary elements of a preferred claim and the rule stated as to augmentation and tracing	7
2. There has been neither augmentation, nor tracing to the receiver, in the instant case	14
B. No valid basis existed for impressing a trust upon the cash in the bank at the time of the transaction with Brinson, to cover the anticipated purchase price of the bonds, either by reason of any agreement that such trust should arise, or by construction of the acts of the parties. The only agreement was that the bank would purchase the bonds and charge the purchase price to the deposit account of Brinson	19
1. No express trust was created by agreement of the parties	19
2. No constructive trust arose from the acts of the parties	21
(*a*) A trust cannot exist without a trust res	21
(*b*) The charge to the account of respondent and corresponding credit to the bank's bond account was not the equivalent of withdrawing cash and delivering the same in trust.	22
(*c*) Analysis of cases relied upon by court below	26
(*d*) Further reasons assigned by court below	30

Page

(c) Breach of trust by the bank cannot, of itself, constitute a basis for a preferred claim. 33

VII. Conclusion 36

Appendix:

1. Decisions in the Federal courts wherein actual augmentation (as distinguished from book-keeping transfers) was required..... 39
2. Decisions in the State courts to the same effect. 40
3. Decisions in the Federal courts involving the mingling of trust funds with balances in correspondent banks, insisting upon specific following and negativing any idea of a general lien..... 42

TABLE OF CASES.

Citations.

Cases:

American Can Co. v. Williams, 176 Fed. 816, affirmed in 178 Fed. 420..... 18, 39, 42

Anadarko Cotton Oil Co. v. Litteer, 300 Fed. 222..... 43

Anheuser-Busch Brewing Ass'n v. Clayton, 56 Fed. 759.... 39

Barthold v. Millett, 22 Fed. (2) 538..... 43

Beard v. Independent District of Pella City, 88 Fed. 375, 381 ..... 11, 13, 23, 27, 39

Board of Commissioners of Crawford Co. v. Patterson, 149 Fed. 229..... 42

Board of Commissioners of Crawford Co. v. Strawn, 157 Fed. 49..... 42

Brennan v. Tillinghast, 201 Fed. 609..... 39, 42

Bryan v. Coconut Grove Bank & Trust Co., 132 So. 481.... 27

Burnes Nat. Bank of St. Joseph, Mo., v. Spurway, 28 Fed. (2) 40..... 40

Citizens Bank of Pinewood v. Bradley, 134 S. E. 510..... 41

City of Centralia v. Titlow, 243 U. S. 656..... 43

City of Miami v. First Nat. Bk. of St. Petersburg, 50 F. (2) 267..... 39

Clark Sparks & Sons Mule & Horse Co. v. Americus Nat. Bk., 230 Fed. 738..... 42

Commercial Nat. Bk. v. Armstrong, 39 Fed. 684, affirmed 148 U. S. 50..... 18

Commonwealth ex rel. v. State Bank of Pittsburgh, 216 Pa. 124..... 41

Cook County Nat. Bk. v. United States, 107 U. S. 445, 450 7, 36

Page

Cunningham, Trustee of Ponzi, v. Brown, 265 U. S. 1, 11.. 14, 35
Cuttell v. Fluent, 51 Fed. (2) 974..... 43
Davis v. Elmira Savings Bank, 161 U. S. 275..... 10, 30, 36
Davis v. McNair, 48 Fed. (2) 494..... 26
Dickson v. First Nat. Bk. of Buffalo, Okla., 26 F. (2) 411.. 43
Dudley v. Richards, 18 F. (2) 876..... 43
Ellerbe v. Studebaker Corp. of America, 21 F. (2) 993..... 42
Empire State Surety Co. v. Carroll County, 194 Fed. 593, 603, 604..... 9, 10, 17, 35
Farmers State Bk. of Burlington v. Pribble, 15 F. (2) 175.. 13, 17, 18
First National Bank of Chicago v. Selden, 120 Fed. 212.... 30
First Nat. Bk. of Forsyth v. Fidelity & Deposit Co., 48 F. (2) 585..... 43
First Nat. Bk. of Ventura v. Williams, 15 F. (2) 585, 588.. 18, 26
Frank v. Bingham, 42 N. Y. S. 767..... 41
Freiberg v. Stoddart, 161 Pa. 259..... 41
Gans & Klein, In re, 14 F. (2) 116..... 29
Goodyear Tire & Rubber Co. v. Hanover State Bank, 109 Kans. 772, 204 Pac. 992..... 27
Gwynn v. Spurway, 28 F. (2) 37..... 43
Harry Fagan, Receiver, First National Bank, Avon Park, Fla., v. Whidden and Jones, —— F. (2) —— (5th C. C. A.-March 26, 1932)..... 34
Hecker-Jones-Jewell Milling Co. v. Cosmopolitan Trust Co., 136 N. E. 333, 335 (Mass.)..... 23, 40
Hirning v. Federal Reserve Bank, 52 F. (2) 383, 386..... 12, 21
Hornick, More & Porterfield v. Farmers & Merchants' Bank, 227 N. W. 375..... 41
Howland v. People ex rel. Russell, 229 Ill. App. 23..... 26
Jayne & Mason, In re, 251 N. Y. S. 768..... 41
Larabee Flour Mills Co. v. First Nat. Bk. of Dublin, 52 F. (2) 146..... 13, 39
Larabee Flour Mills v. First Nat. Bk. of Henryetta, Okla., 13 F. (2) 330; cert. den. 273 U. S. 727..... 13, 39
Lucas County v. Jamison, 170 Fed. 338..... 39, 43
Macy v. Roedenbeck, 227 Fed. 346..... 13, 18, 43
Marine Bank of Chicago v. Fulton County Bank, 69 U. S. 252 29
Mark v. Westlin, 48 F. (2) 609, 610..... 24, 27, 40
Marshburn v. Williams, 15 F. (2) 589..... 42
Mechanics' & Metals Nat. Bk. v. Buchanan, 12 F. (2) 891; cert. den. 273 U. S. 715..... 13, 39
Merchants & Farmers Bank v. Austin, 48 Fed. 25..... 39
Miller v. Viola State Bank, 246 Pac. 517 (121 Kan. 193)... 26
Milligan v. First State Bank of Barnard, 226 N. W. 747.... 41

Page

Minard v. Watts, 186 Fed. 345 29
Northern Sugar Corp. v. Thompson, 13 F. (2) 829 29
Northwest Lumber Co. v. Scandinavian-American Bank of Seattle, 225 Pac. 825 (130 Wash. 33) 27, 28, 41
Nyssa-Arcadia Drainage Dist. v. First Nat. Bk. of Vale, 3 Fed. (2) 648 40
Palo Alto County v. Ulrich, 201 N. W. 132, 133 30
People v. City Bank of Rochester, 96 N. Y. 32 41
People v. Merchants & Mechanics' Bank of Troy, 78 N. Y. 269 ..... 26, 32, 41
Perth Amboy Gaslight Co. v. Middlesex County Bank, 45 Atl. 704 40
Rorebeck v. Benedict Flour & Feed Co., 26 F. (2) 440 ..... 13, 40
Sanders v. Stevens, 51 F. (2) 743 42
Schumacher v. Harriett, 7 F. (2) 817 30
Schuyler v. Littlefield, 252 U. S. 707, 710, 713 ..... 14, 18, 35
Sherwood v. Milford State Bank, 53 N. W. 923 40
State v. Grills, 85 Atl. 283, 283 (35 R. I. 70) 28, 29
State ex rel. Spillman v. American Exch. Bk. of Bristow, 201 N. W. 895 (112 Neb. 834) 28
State Bank of Winfield v. Alva Security Bank, 232 Fed. 847 43
Steele Briggs Seed Co. v. Spurway, 28 F. (2) 42 40
St. Louis & S. F. R. R. Co. v. Spiller, 274 U. S. 304, 310 ..... 14, 35
Sunderlin v. Mecosta County Sav. Bank, 74 N. W. 478 40
Titlow v. McCormick, 236 Fed. 209 ..... 18, 40, 43
United States Nat. Bk. of Centralia v. City of Centralia, 240 Fed. 93; cert. den. City of Centralia vs. Titlow, 243 U. S. 656 43
Wachovia Bank & Trust Co., ex parte, 158 S. E. 214 41
Washington Loan & Banking Co. v. Fourth Nat. Bk. of Macon, 38 F. (2) 772 42
Wuerpel v. Commercial-Germania Tr. & Sav. Bk., 238 Fed. 269 18
Zimmerli v. Northern Bank & Trust Co., 191 Pac. 788 41

Statutes:

Sec. 5236, R. S. (12 U. S. C., Ch. 2, Sec. 194) 7, 10
United States Code, Title 19, Ch. 3, Sec. 198 8
United States Code, Title 26, Ch. 3, Sec. 109 8

Other Authorities:

American Law Institute, Trusts Restatement, Sec. 70 21
American Law Institute, Trusts Restatement, Sec. 75 21
Maitland, F. W., Equity, p. 175 37
Stone, Harlan, F., "Some Legal Problems Involved in the Transmission of Funds," 21 Col. L. R. 507, 518 ..... 21, 29, 31, 37

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vs.

CHARLES J. BRINSON, Respondent.

BRIEF OF PETITIONER.

I.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Fourth Circuit (Parker, Circ. J.) is reported in 52 F. (2) 821, and appears in the record at pages 27 to 31. The judgment of the United States District Court for the Eastern District of North Carolina (Meekins,

D. J.) is not reported but appears in the record at pages 21 to 23.

II.

Jurisdiction.

Writ of certiorari was granted February 23, 1932 (R. 32).

III.

Statement of the Case.

This is an action, removed from a State court to the District Court for the Eastern District of North Carolina (R. 2), wherein the plaintiff Brinson (Respondent here) sued the receiver of the First National Bank of New Bern, New Bern, North Carolina (Petitioner here), to establish a preferred claim against the assets of the bank. The case was heard upon complaint (R. 2), answer (R. 6), and testimony (R. 8-20), resulting in a decree (R. 21) for the plaintiff, which was affirmed (R. 27-32) by the Circuit Court of Appeals for the Fourth Circuit. The Petitioner (Receiver) now seeks a review of the decree of that Court.

The facts in the case are undisputed.

On October 14, 1929, respondent Brinson had a deposit balance of $1,961.31 in a savings account (R. 8, 9) in the First National Bank of New Bern, N. C. (hereinafter called "First Bank"). On that day he deposited in said account (R. 8, 9, P. Ex. 2; R. 16, D. Ex. 3) a check for $2,100 drawn on the Eastern Bank & Trust Company (hereinafter called "Eastern Bank"),

thereby making his deposit balance $4,061.31 (R. 9, P. Ex. 2). At the same time, the First Bank agreed to buy for Brinson Liberty Bonds of a par value of $4,000 (R. 8, 10), the deposit of $2,100 being made to provide sufficient funds in the account for such purchase, the understanding being that the deposit would be charged with the price of the bonds when purchased (R. 8-11; R. 9, P. Ex. 1).

The First Bank included the $2,100 check in its clearing house settlement of October 15 with the Eastern Bank (R. 13-14), which resulted in a balance in favor of the First Bank of $5,801.09 (R. 17), which balance Eastern Bank paid by draft (R. 20). On the same day First Bank forwarded this draft (R. 17, 18) to the Norfolk National Bank of Commerce and Trusts (hereinafter called "Norfolk Bank") for credit to First Bank, the same being included with other items aggregating $11,908.88 (R. 17, 18, 19, 20), and at the same time the First Bank drew and forwarded its own drafts for charge against its account in the Norfolk Bank for $12,739.21 (R. 20), and as the result of these debits and credits in the clearance of the items the balance of the First Bank in the Norfolk Bank was $9,413.61 (R. 19, 20). It is to be noted that whereas the balance in favor of the First Bank on October 14 was $10,226.12 (R. 19, D. Ex. 4), the aforesaid clearing settlement on October 15 (after crediting the $11,908.88 which included the $5,801.09 draft) reduced the balance to $9,413.61 (R. 19, 20). Withdrawals by the First Bank were thereafter made therefrom, resulting in an overdraft of $5,810.56 on October 18, and also a con-

tinuous overdraft at the Norfolk Bank during the last five days before the closing of the First Bank on October 25. At the time of closing, the account was overdrawn $970.23 (R. 19, D. Ex. 4).

On October 19 the cashier of the First Bank advised Brinson that the bonds had been purchased (which was untrue), and that delivery would be made in "eight or ten days" (R. 10). At the same time the cashier delivered to Brinson a memorandum (R. 9, P. Ex. 1) of a charge of $3,964.60 to his account, representing the supposed purchase price of the bonds. The actual charge to Brinson's account was made on October 21, when the bank charged Brinson's account and credited its "Bond Account" with $3,964.60 (R. 9, P. Ex. 2; R. 11, P. Ex. 3; R. 12, P. Ex. 4). No cash was handled or transferred in connection with this transaction. For some reason not explained by the record, the bonds were not ordered or purchased by the First Bank up to the time of suspension. No changes took place in the said bond account after the aforesaid credit transfer (R. 12).

At all times between October 14 and the date of suspension, the actual cash in the vaults of the bank was considerably in excess of $3,964.60 (R. 16, 17).

In answering the suit of Brinson for a preference claim or lien, the Receiver defended on the ground that no trust fund was created in favor of Brinson; that the proceeds of the deposit account of Brinson had not augmented or increased the bank's assets, and that no funds or property identifiable as belonging to the plaintiff could be traced to the cash taken over by the

Receiver at suspension (R. 23-25, Deft's Assignment of Errors). The District Court held that there had been augmentation of the assets of the bank and tracing of the deposit account to the cash in the hands of the Receiver and that a preferred claim should be allowed (R. 22, 23). The Circuit Court of Appeals also held that there was augmentation (R. 28), but that irrespective of augmentation the cash in the bank at the time of the transaction was impressed with a trust for the full amount of the supposed purchase price of the bonds, and it thereupon affirmed the judgment of the District Court and allowed the preferred claim.

IV.

Specification of Errors.

(*a*) The Circuit Court of Appeals erred in holding that the transaction between the respondent Brinson and the insolvent bank resulted in augmentation of the assets of the bank and that the same constituted the basis of a trust in favor of Brinson for $3,964.60 traceable to the assets acquired by the Receiver.

(*b*) The Circuit Court of Appeals erred in holding that, irrespective of augmentation and tracing, the transaction constituted "in effect an agreement by the bank that a definite amount" (R. 30) of the cash in its possession at the time of the transaction would be held in trust for the purpose of purchasing the bonds, and that consequently the funds passing to the Receiver were impressed with a trust in favor of the respondent

Brinson in the sum of $3,964.60, representing the anticipated purchase price of the bonds.

V.

SUMMARY OF ARGUMENT.

A. The unmistakable trend and weight of Federal decisions concerning preferred claims against national banks in receivership clearly establishes: (1) that a preferred claim can exist only where the transaction of the claimant with the bank has resulted in a relationship of trust between the bank and the claimant; (2) that the assets of the bank must have been augmented or increased by new cash or property accruing from the claimant; (3) that the new property can be traced to the assets taken over by the receiver at suspension; (4) that no augmentation or tracing occurs where the transaction results only in a shifting of book-keeping credits, and (5) that no tracing exists where, assuming augmentation, the proceeds of augmentation are entirely dissipated or disbursed prior to suspension of the bank.

Assuming for discussion only that a trust relationship arose, no augmentation or tracing existed in the instant case, and there was merely a shifting of credits from the deposit account of Brinson to the bond account of the bank.

B. No valid basis existed for impressing a trust upon the cash in the bank at the time of the transaction with Brinson, to cover the anticipated purchase price of the bonds, either by reason of any agreement that

such trust should arise, or by construction of the acts of the parties. The only agreement was that the bank would purchase the bonds and charge the purchase price to the deposit account of Brinson. This was not equivalent to cashing a check upon the account and delivering the cash to the bank to pay for the bonds. There was no agreement that a portion of the cash funds of the bank would be segregated to purchase the bonds and no such segregation actually occurred, and consequently no trust arose. Assuming that the action of the bank in charging the deposit account of Brinson and falsely advising him that the bonds had been purchased, was improper, such misconduct would not be sufficient to create a preferred claim.

VI.

ARGUMENT.

A. A preferred claim should not be allowed respondent Brinson because the required elements of trust relationship, augmentation of assets of the bank, and tracing of trust property to the receiver did not exist.

(1) *The Necessary Elements of a Preferred Claim and the Rule Stated as to Augmentation and Tracing.*

The general rule is that distribution of the assets of a national bank must be made in accordance with Section 5236 U. S. R. S. (12 U. S. C., ch. 2, sec. 194), which requires a *pro rata* distribution amongst all creditors. In *Cook County National Bank* v. *United States*, 107 U. S. 445, 450, the Court said, in referring to this section, that it

> "provides for the distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming the notes. When this reimbursement is fully provided for, the balance of the assets, as the proceeds are received, is subject to a ratable dividend on all claims proved to the satisfaction of the receiver, or adjudicated by a court of competent jurisdiction."

Except for preferences to the United States the statute contemplates absolute equality among creditors. Preference to the United States is given only for the redemption of circulating notes (referred to in the Cook County case); payment of certified checks given the United States for customs duties (19 U. S. C., Ch. 3, sec. 198), and collection of certain taxes (26 U. S. C., Ch. 3, sec. 109).

The courts have, however, established a basis for another class of preferred claims, namely, where the applicant can show that the receiver has, among the assets acquired by him, identifiable property belonging to the claimant. In working out the formula or procedure for establishing such claims, the Federal courts have held generally that claimant must show, *by the burden of proof,* that from the transaction of the claimant with the bank before suspenison (*a*) the bank received property of the claimant in trust, (*b*) that the property so received actually augmented the existing assets of the bank by way of adding thereto cash or other property (as distinguished from the addition of a bookkeeping credit), and (*c*) that the augmented assets, or the pro-

ceeds thereof, are traceable into the assets taken over by the Receiver. See *Empire State Surety Company* v. *Carroll County, infra.*)

If, for example, a bank receives an item for collection and remittance and collection is made in the form of cash (as distinguished from the receipt in payment of a check drawn upon the bank), it is considered that a trust relationship exists in such cases, and that the existing assets of the bank have been augmented or increased by the trust property; and consequently if it can be shown further that said trust property was not dissipated by the bank prior to suspension, but, on the contrary, the trust funds, or other funds constructively in lieu thereof, were retained by the bank and were taken over by the receiver at suspension, a preferred claim will be allowed.

On the other hand, if a bank receives for collection and remittance an item drawn against one of its depositors, and payment is made by the depositor by giving the bank a check drawn upon his account, the depositor's balance is thereupon charged with the amount of the check and a corresponding credit, for remittance purposes, is made in favor of the owner of the item. In such case no new funds have accrued to the bank, since the cash and physical assets are exactly the same after as before the collection, and there has been merely a shifting of book-keeping credits. Consequently, there has been no augmentation, and under the great weight of Federal decisions a preferred claim cannot be allowed.

The principles referred to in the two next preceding paragraphs are discussed in the opinion of the Circuit Court of Appeals for the Eighth Circuit in the leading case of *Empire State Surety Company* v. *Carroll County*, 194 Fed. 593, 603, 604, 606. In that case the bank, having fraudulently represented that it was solvent, improperly received deposits, and a preferred claim was sought to be established against the subsequently appointed receiver. In stating the applicable principles, the Court said:

> "This is a suit in equity against the receiver of a national bank to require him to take from the ratable dividends of other creditors of the bank the requisite amount to pay the county's claim in full. The receiver must make the distribution of the property of this bank in accordance with the provisions of the national banking law. It is the dominant purpose and requirement of that law that, after provision for a redemption of its notes is made, the proceeds of an insolvent national bank shall be equally distributed among its unsecured creditors. So imperative is this provision that it repeals a former act of Congress giving a preference to the United States and annuls a statute of a state giving a preference to deposits of savings banks. Rev. St. sec. 5236 (U. S. Comp. St. 1901, p. 3508); *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 285, 16 Sup. Ct. 502, 40 L. Ed. 700; *National Bank* v. *Colby*, 21 Wall. 609, 613, 614, 22 L. Ed. 687. The burden, therefore, is on the sureties to prove clearly that they are entitled on equitable principles to the preference they seek. They proved that the bank took the deposits of

the county and of its other depositors in trust for them respectively. *But this was not enough. They were also required to prove that these deposits or their proceeds, or a certain part of them, came to the hands of the receiver, for he is liable to cestuis que trustent to pay trust funds in full only to the extent that he receives them.*

* * * * * * *

"It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver.

* * * * * * *

"But checks of third persons on the bank with which they are deposited *which are paid by crediting the bank and charging the drawers on its books fail to increase the cash in its possession and form no basis for a preferential payment to the depositor. Beard* v. *Independent District of Pella City,* 88 Fed. 375, 382, 31 C. C. A. 562.

"Moreover, the deposit of checks of third persons which are credited to the depositor and used by the bank to pay its debts bring no money into its fund of cash and form no foundation for preferential payment to the depositor. *City Bank* v. *Blackmore*, 75 Fed. 771, 773, 21 C. C. A. 514.

"Again, checks of third parties deposited with a bank credited to the depositor and collected through a clearing house lay no foundation for a preferential payment, in the absence of proof of the actual balance of cash the bank received on account of them, for they may have been and usually are used in whole or in part to discharge the debts of the bank. *In re Seven Corners Bank*, 58 Minn. 5, 59 N. W. 633; *City of St. Paul* v. *Seymour*, 51 Minn. 303, 308, 74 N. W. 136; *Willoughby* v. *Weinberger*, 15 Okla. 226, 229, 79 Pac. 777." (Italics inserted.)

In a recent case in the Circuit Court of Appeals for the Eighth Circuit—*Hirning* v. *Federal Reserve Bank*, 52 Fed. (2) 382, 386—The Court, in discussing these principles, said:

"It is contended by the appellee that the checks sent by the Reserve Bank to the Brookings Bank *constituted a trust fund*, and that this trust fund has been traced into the currency and collection items sent by the Brookings Bank to the Reserve Bank.

The trial court seems to have adopted this view as one of the grounds of its decision in ordering judgment for defendant.

We do not agree with this contention. It must be remembered that the checks sent to the

Brookings Bank by the Reserve Bank were all of them checks drawn on the Brookings Bank. When the Brookings Bank accepted the checks, this produced no additional funds in its hands. Its assets were not augmented. *No trust fund was created.* If there was no trust fund, there could, of course, be no tracing of the trust fund into any assets of the Brookings Bank. The doctrine that a trust fund is created when checks drawn on bank A by a depositor therein are sent to bank A by bank B for collection, *i. e.*, for payment, has been disapproved by the decisions in this Circuit, as has also the doctrine that the forwarding bank or its principal has a general lien on the assets of the drawee bank for the payment of such checks. *Rorebeck* v. *Benedict, etc. Co.*, 26 Fed. (2) 440; *Farmers National Bank* v. *Pribble*, 15 Fed (2) 175; *Larabee Flour Mills* v. *First Nat. Bank*, 13 F. (2) 330; *Macy* v. *Roedenbeck*, 227 Fed. 346, 352; *Beard* v. *Independent Dist.*, 88 Fed. 375." (Italics inserted.)

In the Appendix hereto, on pages 39, 40, will be found other Federal decisions to the same effect in the Eighth Circuit, as well as similar decisions in the Second, Fifth, Sixth, Ninth and Tenth Circuits. In two of these cases certiorari was denied by this Court: *Mechanics and Metals National Bank v. Buchanan*, 12 Fed. (2d) 891 (C. C. A.-8-1926), certiorari denied 273 U. S. 715; *Larabee Flour Mills* v. *First National Bank of Henryetta, Oklahoma*, 13 Fed. (2d) 330 (C. C. A.-8-1926), certiorari denied 273 U. S. 727. This same doctrine of augmentation and tracing is also established by the State Courts of Massachusetts, Michigan, New

Jersey, New York, Pennsylvania, South Carolina, South Dakota, and Washington. (See cases cited in Appendix at pages 40, 41.)

The burden of proof is upon the applicant to establish his claim and trace the proceeds to the receiver or trustee. (See *Schuyler* v. *Littlefield*, 232 U. S. 707, 710, 713; *Cunningham Trustee of Ponzi* v. *Brown*, 265 U. S. 1, 11; *St. Louis & S. F. R. R.* v. *Spiller*, 274 U. S. 304, 310.)

(2) *There Has Been Neither Augmentation nor Tracing to the Receiver in the Instant Case.*

In subdivision B of the Argument, *infra*, we discuss the question of trust relationship, and seek to show that no trust existed in favor of the respondent Brinson. The present discussion will relate primarily to the elements of augmentation and tracing, assuming for discussion only that a trust relationship existed.

In the instant case the respondent Brinson had an existing deposit balance of $1,961.31 in the First National Bank of New Bern. He deposited, in regular course in his account, on October 14, a check for $2,100 drawn on the Eastern Bank and Trust Company and received credit therefor, with the understanding that the bank would purchase approximately $4,000 of Liberty Bonds and charge his account for the amount thereof when purchased. *In the meantime the deposit was to stand to his credit for the full amount.* It will be noted that the agreement between the parties contemplated the use of the deposit balance at a future date in the same manner as if at such future date the

depositor had drawn a check to the bank for the amount of the contemplated purchase price of the bonds. The situation is, therefore, exactly analogous to the cases cited and quoted, *supra*, where a depositor gives his bank a check on his account in payment of an obligation. As already indicated, no new assets are added to the bank by such transaction, and a shifting of credits or book-keeping entries only results. In the instant case the bank charged the deposit account of Brinson with $3,964.60 (the contemplated purchase price of the bonds), on October 21, and credited its bond account with a corresponding amount, thereby shifting the credit from the deposit account of Brinson to the bond account of the bank. The assets of the bank, however, were no greater after, than before, the shifting of the deposit credit.

It may be noted in passing at this point that the $2,100 check drawn on the Eastern Bank and Trust Company should, under elementary principles, be considered to have been the property of the bank in that it was deposited in due course in the account of Brinson in the customary manner, and although it was expected that the credit thereby resulting would be used in the future for the purchase of the bonds, nevertheless, in the meantime *it stood to his credit in his deposit account, and title to the funds it represented was in the bank and a debtor and creditor relation only existed as in other deposit accounts.* Consequently, it would appear that no trust relationship existed as to the same, and, therefore, the question of augmentation and tracing should not, on principle, need to be con-

sidered. The same comment applies to the balance of $1,961.31, which already existed at the time of the deposit of the $2,100 check. The relation of debtor and creditor unquestionably existed as to this amount, and further consideration of the same in this connection is unnecessary.

However, even if it be assumed (but without conceding it) that a trust arose as to the $2,100 check when it was deposited, it is submitted that the same did not ultimately augment or increase the assets of the bank, or, if it be assumed that such augmentation occured, it would appear that the porceeds of the check cannot be traced to the assets acquired by the receiver. As indicated in the statement of facts (*supra*, page 2) the First Bank included the check in its clearing house settlement of October 15 with the Eastern Bank (R. 13-14) resulting in a balance in favor of the First Bank of $5,801.09 (R. 17), which balance the Eastern Bank paid by draft (R. 20). On the same day First Bank forwarded this draft (R. 17, 18) to the Norfolk Bank for credit to the First Bank, the same being included with other items aggregating $11,908.88 (R. 17, 18), and at the same time the First Bank drew and forwarded its own drafts (relating to other matters), for charge against its account in the Norfolk Bank, and, as a result of these debits and credits in the clearance with the Norfolk Bank, the balance of the First Bank in the Norfolk Bank was $9,413.61 (R. 19, 20). It is, therefore, to be noted that, whereas the balance in favor of the First Bank on October 14 was $10,226.12, the clearing settlement of October 15 (even

after crediting the $11,908.88 which included the $5,801.09 draft) reduced the balance to $9,413.61 (R. 19, 20). Hence it is obvious that the use of the $2,100 check did not, on October 15, augment the assets of the bank, the same being used in the clearings to pay its obligations, and, therefore, in this respect the case is governed by *Empire State Surety Company* v. *Carroll County,* 194 Fed. 593, 606 (numbered paragraphs 10 and 11, quoted *supra,* page 12); also see *Farmers' National Bank* v. *Pribble,* 15 Fed. (2) 175.

Assuming, however, that the balance of $9,413.61 did include the credit resulting from the $2,100 check, it is also to be noted that withdrawals by the First Bank were thereafter made, from time to time, resulting in an overdraft of $5,810.56 on October 18, and also a continuous overdraft at the Norfolk Bank during the last five days before the closing of the First Bank on October 25, the overdraft at suspension of the First Bank being $970.23 (R. 19-D. Ex. 4). The rule is *thoroughly settled that the preferred claimant must trace the fund through the correspondent bank into the assets taken over by the receiver, and that the mingling of the trust funds with other funds of the insolvent bank in the hands of the correspondent bank does not produce a lien upon the general assets of the bank, or upon balances with other correspondent banks, or even upon the cash remaining in the vaults of the insolvent bank.* The authorities in this connection appear in the Second, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Federal Circuits, and will be found cited in the

Appendix hereto on pages 42, 43. The record in this case is silent as to the use made by the First Bank of its balances in the Norfolk Bank. All of the same may have been and probably were, used in the payment of the debts of the insolvent bank, and in the absence of a showing as to the disposition of such balances in the correspondent bank, there has been no specific tracing, and a recovery must be refused. *Commercial Nat. Bk.* v. *Armstrong,* 39 Fed. 684, affirmed in 148 U. S. 50 (1893); *Farmers' Nat. Bk. of Burlington* v. *Pribble,* 15 Fed. (2) 175 C. C. A. 8-1926); *First Nat. Bk. of Ventura* v. *Williams,* 15 Fed. (2d) 585 (D. C.-N. C.-1926); *American Can Co.* v. *Williams,* 176 Fed. 816 (C. C. N. Y. 1908), affirmed in 178 Fed. 420 (C. C. A.-2-1910); *Titlow* v. *McCormick,* 236 Fed. 209 (C. C. A.-9-1916); *Wuerpel* v. *Commercial-Germania Trust & Savings Bk.,* 238 Fed. 269 (C. C. A.-5-1917); *Macy* v. *Roedenbeck,* 227 Fed. 346 (C. C. A.-8-1915).

No presumption can be indulged that any of the fund from the correspondent bank reached the insolvent bank, or passed to the receiver. *Titlow* v. *McCormick,* 236 Fed. 209, 214. The burden of tracing the fund is upon the claimant, and once it is dissipated it "cannot be treated as reappearing in sums subsequently deposited to the credit of the same account." *Schuyler* v. *Littlefield,* 232 U. S. 707, 710.

It seems obvious from the foregoing that the respondent Brinson failed to prove the necessary elements of augmentation and tracing as to any part of the claimed fund of $3,964.60, the supposed purchase price of the bonds.

B. No valid basis existed for impressing a trust upon the cash in the bank at the time of the transaction with Brinson, to cover the anticipated purchase price of the bonds, either by reason of any agreement that such trust should arise, or by construction of the acts of the parties. The only agreement was that the bank would purchase the bonds and charge the purchase price to the deposit account of Brinson.

The Court below held that, irrespective of the factors of augmentation and tracing, "the result of the agreement" of the parties was such that "a trust was impressed upon (the cash in the bank) to the extent of the amount necessary to make the purchase" of the bonds (R. 29), and that there was "in effect an agreement by the bank that a definite amount of the funds in its possession shall be held in trust for a specified purpose" (R. 30). For the reasons hereinafter stated it is believed such position cannot be sustained.

1. No Express Trust was Created by Agreement of the Parties.

It is worthy of emphasis that the facts in this case are not in dispute. The divergence of views between the parties relates only to the legal construction to be placed upon such facts.

The fair inference from the facts would certainly appear to indicate clearly that the *only express agreement* between the two parties was that the bank would order the bonds, and that thereafter the purchase price of the same was to be charged against the deposit

account of Brinson. The record does not disclose any express agreement that any portion of the bank's cash funds would be segregated, or that such funds would be impressed with a trust for that purpose. The existence of a trust agreement is entirely inconsistent with the *deposit of the additional* $2,100 *in the savings account of Brinson with the understanding that it should remain on deposit in that account and that the account would later be charged with the purchase price.* Under the principles already discussed (p. 15, *supra*), a debtor and creditor relationship only was established, and title to the deposited funds was intended to be in the bank. The Circuit Court of Appeals at one place in the opinion appears to recognize this when it states:

> "If nothing more had occurred than that the bank had agreed to purchase bonds for him *to be paid for later out of funds on deposit, it may well be that no trust would have arisen.* But something more did occur. The bank charged his account with the price of the bonds and credited its bond account with the amount charged" (R. 30-31).

Manifestly, in view of this, it was considered by the Court, not only that no express trust existed at the time of the deposit on October 14, but that no implied or constructive trust arose at that time. It would seem obvious that the subsequent *ex parte* act of the bank in charging the deposit account and crediting the bond account could not, *per se,* constitute an *express* agreement between the parties for a trust. Consequently if a trust arose at all it must have been a constructive

trust. This question will be discussed in the next portion of the argument.

2. No Constructive Trust Arose from the Acts of the Parties.

(*a*) *A trust cannot exist without a trust res.*

A constructive trust cannot exist unless there is a trust *res, i. e.,* property to which the trust pertains. *American Law Institute, Trusts Restatement,* sec. 70. The theory of tracing trust funds or property necessarily implies that there is a fund or *res* to be followed. *Hirning* v. *Federal Reserve Bank,* 52 Fed. (2) 382, 386. If it be said that the debt owing by the bank to the depositor in the instant case became the trust *res,* the answer is that "an obligor cannot be trustee either of his duties or of the obligee's rights under the obligation." *American Law Institute, Trusts Restatement,* sec. 75, and comment "*a*" and illustration thereto. In discussing a situation analogous to the instant case, Mr. Justice Stone, in Columbia Law Review of June, 1921, Vol. XXI, p. 518, says:

> "The doctrine that money deposited with a bank for a special purpose is a fiduciary deposit, has been carried to extreme lengths in this country in those cases where no specific money was ever paid to the bank, the customer merely giving or procuring a credit in account in favor of the bank upon the banker's undertaking to effect payment at a distant point. Here there is no specific deposit. The transaction results only in a credit appearing on the books of the bank,

there being at no point of time any specific money or other *res* paid to or set apart or held by the bank for account of the customer. *Even if there were an executory undertaking of the bank to become a fiduciary by setting apart such specific sum, such a relationship is not established until there is some actual setting apart or segregation of the money or some other res as the subject matter of the fiduciary relationship.*" (Italics inserted.)

(b) *The charge to the account of respondent and corresponding credit to the bank's bond account was not the equivalent of withdrawing cash and delivering the same in trust.*

The Court below considered that a trust *res* was created by the charge against the deposit account of Brinson, and the corresponding credit of the same to the bank's bond account, in view of the facts that Brinson had sufficient funds in the account to meet the charge, and that as the bank had previously agreed to buy the bonds and charge the account with the purchase price, a trust was impressed upon the bank's cash to the amount necessary to make the purchase (R. 29).

The first reason assigned by the Court (R. 29) is that the agreement of the bank to charge the account of Brinson with the purchase price of the bonds was equivalent to the giving of a check by Brinson upon his account, and that the giving of such a check and the charging of the same to the account would have been the same in effect as cashing the check and immediately giving back to the bank the cash funds to

purchase the bonds, and that in such latter case there would be an augmentation of assets, or trust *res*, as the basis of the preferred claim.

The fact is that no money was withdrawn either by check or otherwise, and only book-keeping entries were made, and the foregoing argument can be supported only by resorting to legal fiction instead of reliance upon the facts.

This argument is specifically answered in *Beard* v. *Independent District of Pella City*, 88 Fed. 375, 381, where a similar contention was made to support a preferred claim. Mr. Justice Shiras, in confuting such reasoning, said:

> "It is claimed in argument that the court must treat the case just as though the treasurer of the school district had presented the check, had obtained the money thereon, and had then deposited the money in the bank as the money of the school district, *but this was not in fact done; and as against the creditors, whose money in fact created the cash amount coming into the hands of the receiver, why should fiction be resorted to in order to sustain a preference* on behalf of the school district to payment out of a fund not augmented in fact by any sum belonging to the district?" (Italics inserted.)

To the same effect is the opinion of Mr. Justice De Courcy in *Hecker-Jones-Jewell Milling Co.* v. *Cosmopolitan Trust Company*, 136 N. E. 333 (Mass.-1922), on 335:

> "The other theory is that the transaction by which the draft was paid was, in legal effect, the

same as if B. Greenglass & Son had drawn from their account through the paying teller the sum of $3,518 in money, and then handed it back to the collecting teller in payment of the draft. *But that is not what the debtor did; and the difference is essential, not a mere matter of form.* The payment made to the bank was not cash, to which the moment before it had not the slightest claim, and which therefore would count as wholly separate 'proceeds' of the collection; it was merely the lessening of one of its own debts, and productive of nothing even remotely suggesting a 'res' for a trust. The difference between the legal significance of the actual and the assumed courses of action cannot be ignored or confused." (Italics inserted.)

A situation very closely analogous to the instant case is reported in *Mark* v. *Westlin*, 48 Fed. (2) 609 (D. C. Minn. 1931, Sanborn, D. J.). In that case the plaintiff arranged with the bank for the purchase of liberty bonds and gave it a withdrawal slip or check upon a savings account for the estimated amount of the bonds. The bank gave her a receipt reading as follows:

> "'Received of Mrs. Ida Mark twenty-five hundred thirty-four dollars, forty-six cents ($2,534.46) for twenty-five hundred ($2,500) dollars in Fourth Liberty Bonds to be registered in the name of Mrs. Ida Mark, Moorhead, Minnesota.'"

A withdrawal entry was made at the time upon her savings account pass-book and the bonds were ordered through the Federal Reserve Bank, but before delivery

was made the bank closed and the bonds were retained by the Reserve Bank. Thereupon the depositor sought to establish a preferred claim. The Court, in discussing the basic principles concerning preferred claims and in specifically refuting the contention that the giving of a check is the same as delivery of cash, said in part as follows:

> (609) "One difficulty which some courts have had in dealing with the question of recovery of funds misapplied by an insolvent bank arises out of a failure to take into consideration the fact that the controversy is not between the claimant and the bank, but between the claimant and the other creditors with respect to a particular fund in the hands of the receiver. * * *
>
> (610) "It is firmly settled by numerous decisions of the courts of this and other circuits that, in order to establish a preferred claim, the claimant must show that the funds of the bank were actually augmented by the transaction under which he claims his right to priority. * * *
>
> "*It is claimed here by the plaintiff that the giving of the withdrawal slip to the assistant cashier was the same as though she had drawn out of the bank that much currency and had then delivered it to the assistant cashier for the purpose of purchasing the Liberty bonds.* There is nothing which Mrs. Mark did which augmented the assets of the bank which came into the hands of the receiver. Its cash assets were contributed by others. Had the withdrawal slip never been drawn, and had no instructions been

> given for the purchase of the bonds, the result would have been the same so far as the receiver is concerned. The other cerditors were in no way benefitted by what Mrs. Mark did. * * *'' (Italics inserted.)

With reference to a similar argument in another type of case, the learned Judge of the lower court said in *First Nat. Bk. of Ventura* v. *Williams*, 15 Fed. (2) 585 (D. C.-N. C.-1926), on 588:

> "Counsel for complainant insists that, but for the labor-saving device of clearing by the exchange of checks, this check would have been collected in cash and the cash which came into the hands of the receiver would have been augmented as a result thereof, and that the fact that the clearance was resorted to should not be allowed to deprive him of the advantage which he would have had under a cash collection. *The answer to this is that courts must decide cases, not upon suppositions, but upon facts as proven or admitted, and the admitted fact is that cash was not received for the check, but that it was used merely to reduce the liabilities of the bank.*'' (Italics inserted.)

Also see, in line with the foregoing Federal decisions, *Miller* v. *Viola State Bank*, 246 Pac. 517, 121 Kans. 193; *Howland* v. *People*, 229 Ill. App. 23; *People of State of New York* v. *The Merchants and Mechanics Bank of Troy*, 78 N. Y. 269.

(*c*) *Analysis of cases relied upon by Court below.*

Davis v. *McNair*, 48 Fed. (2) 494:

The plaintiff, Davis, arranged with his bank to buy for him certain Liberty bonds, and tendered the bank his pass-book and offered to draw out the money for that purpose. He was informed that it was not necessary to draw out the money, and that the bank would purchase the bonds and charge the same to his account. The bonds were purchased but were retained by a correspondent bank, and plaintiff sought, *inter alia,* to establish a preferred claim. The Court held there, as in the instant case, that the relation of the parties was changed from debtor and creditor to a trust relationship, and that the situation was the same as though the plaintiff had actually withdrawn the cash and delivered the same to the bank for the purchase of the bonds, and that in consequence a trust was impressed upon the bank's assets for which a preferred claim should be allowed.

This is the only Federal case cited in this connection by the Court below in support of its position. It is clearly contrary to the principle announced in the Federal cases of *Beard* v. *Independent Dist. of Pella City, supra,* and *Mark* v. *Westlin, supra,* and is a departure from the entire trend of Federal decisions for the reasons hereinbefore discussed. The McNair case relies upon the state decisions of *Goodyear Tire & Rubber Co.* v. *Hanover State Bank,* 109 Kans. 772, 204 Pac. 992; *Northwest Lumber Co.* v. *Scandanavian-Amer. Bank,* 225 Pac. 825, 130 Wash. 33, and *Bryan* v. *Coconut Grove Bank & Trust Co.,* 132 So. 481. These cases hold that the giving of a check and the charging of the same to the deposit account is equivalent to delivery of cash.

They are, of course, at variance with the Federal rule, and the McNair case therefore should not be relied upon as authority.

The case of *State* v. *Exchange Bank of Bristow*, 112 Nebr. 834, 201 N. W. 895, cited by the Court below in the foregoing connection, involved primarily the question of whether or not a certain Certificate of Deposit was within the provision of the State guaranty of deposits law. Incidentally it held that the surrender by the plaintiff of certain certificates of deposit and the receipt of others in lieu thereof was equivalent to the deposit of cash. This is the same in principle in this respect as the state cases above referred to and is not entitled to weight against the Federal rule.

The case of *Northwestern Lumber Company* v. *Scandanavian-American Bank*, 130 Wash. 33, 225 Pac. 825 (cited by the Court below as 226 Pac.), has been discussed in connection with the McNair case, *supra*.

State v. *Grills*, 35 R. I. 70, 85 Atl. 281, 283:

This case is cited by the Court below with particular reference to the theory that the general account of the respondent Brinson was converted into a special deposit. The case relates primarily to the guilt of the defendant under an indictment for embezzlement. Defendant was a private banker and had agreed with a depositor to forward a portion of the deposit to a bank in Italy. The defendant apparently charged the account of the depositor and also gave him a receipt acknowledging the money for transmission, and in addition wrote in the depositor's pass-book "August 3,

1908, Sent to Rome $600." The defendant did not forward the money and did not repay the same to the depositor and was found guilty of embezzlement. As an authority the case would appear to be completely disposed of by the comment of Mr. Justice Stone concerning the same:

> "In *State* v. *Grills*, it was held that the banker by failing to effect the transfer was guilty of embezzlement of a 'special deposit,' *which in fact had never existed in any form except that of a credit on the books of the banker. That the bank could not become fiduciary or trustee of its own obligation to the customer or commit larceny of it would seem not to be an arguable proposition.*" (Italics inserted.) Stone: Some Legal Problems involved in the Transmission of Funds, 21 Col. L. R. 507 on 518 (1921).

The presumption is that every depositor is a general depositor, and and the burden of proof is upon the claimant to show to the contrary (*Northern Sugar Corp.* v. *Thompson*, 13 Fed. (2) 829; *Minard* v. *Watts*, 186 Fed. 245). A special deposit necessarily implies specific property held by the bank as bailee or trustee (*Marine Bank of Chicago* v. *Fulton County Bank*, 69 U. S. 252), and the previous discussion has indicated that no such *corpus* or *res* existed in the instant case.

The case of *In re Gans & Klein*, 14 Fed. (2) 116 (D. C.-Mont.-1926), cited by the Court below in this connection, involved the question of the right of set-off of a going bank, and whether such set-off constituted a preference in bankruptcy; no question of tracing was involved.

The case of *Schumacher* v. *Harriett*, 52 Fed. (2) 817, referred to by the Court below (R. 29) is a companion case to the one at bar. It is based upon the same reasoning adopted in deciding the instant case and of course cannot be considered as authority in support of the conclusion reached by the Court in the instant case that a trust existed regardless of augmentation and tracing.

In conclusion as to this portion of the discussion, it may be pointed out that the position that the giving of a check by a depositor and the charging of the same to his account is, in legal effect, equivalent to the cashing of the check by the depositor, and the delivery of the cash to the bank, clearly cannot be sustained by the Federal decisions, in that as heretofore indicated, the whole trend of such decisions is to the effect that the giving of a check by a depositor and the charging of the same to his account, amounts to no more than a shifting of book-keeping credits and does not bring in new cash or assets, nor constitute the basis for a preferred claim. While there may be found (as indicated by the cases cited in *Davis v. McNair*, and also by the court below in the instant case), decisions holding to the contrary, nevertheless it is thoroughly settled that in case of conflict the Federal decisions must control in determining whether or not a preferred claim may be allowed against an insolvent national bank. See *Palo Alto County* v. *Ulrich*, 201 N. W. 132, 133; *First National Bank of Chicago* v. *Selden*, 120 Fed. 212; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275.

(d) ***Further reasons assigned by court below.***

The court below further states that the claim of Brinson was not asserted

> "on the ground that the assets of the bank had been augmented by a payment made to it,"

and that

> "what the record discloses is not a shifting of credits, but the creation of a trust with respect to funds already in the bank's possession" (R. 30).

In reply it may be pointed out, in the first place, that paragraph No. 10 in the defendant's bill of complaint *does* rely upon augmentation (R. 4), and augmentation was an issue in the case (R. 21). In the second place, it is to be noted that what the record *does* disclose is "a shifting of credits," in that a portion of the deposit account, or credit, of Brinson is shifted to the bond account of the bank.

Finally, the court holds that the bank, in charging Brinson's account, and crediting the bond account,

> "paid to itself the money necessary for the purchase of the bonds, and charged itself with the same as trustee". (R. 31).

It is obvious that the bank did not, by these bookkeeping entries, pay itself any money, and that the action so taken was merely preliminary to, and in anticipation of, the purchase of the bonds. On this point Mr. Justice Stone has said:

> "The very essence of the right of priority over other creditors depends upon the setting

> apart of a particular fund for the benefit of the depositor. There is no basis for giving one depositor a priority over another unless this is an essential part of the transaction." ("Some Legal Problems involved in the Transmission of Funds", 21 Col. L. R. 507, 525.)

By "particular fund", of course, the learned author means an actual fund and not a mere book-keeping transaction. (*Supra* pages 21 and 29—extracts from 21 Columbia Law Review.) To the same effect is *People* v. *Merchants & Mechanics Bank,* 78 N. Y. 269, where a preferred claim was sought to be established against a closed bank, based upon an item collected by the bank by the acceptance of a check of its depositor, the check being charged to the account, and a remittance draft issued, the remittance draft being caught in suspension, and not paid. Counsel for plaintiff there contended (p. 272)

> "that charging the check to the drawer in its account with the bank, and returning the check to the drawer as paid, amounted to a payment of the check and the setting apart of a sufficient amount of the drawer's deposits to cover the check. That by sending the check to the Troy Bank through the mail, the Chemical Bank constituted the Troy Bank its agent to collect the check, and to hold the proceeds and send them to the Chemical Bank. That, consequently, the Troy Bank, having paid the check to itself as agent of the Chemical Bank held the amount so paid on the check, or set apart for its payment, in trust for the Chemical Bank, and the assets of the Troy Bank embraced the amount so held

in trust, and passed to the receiver impressed with that trust." (Italics inserted.)

In overruling this contention the court said:

> "We are unable to concur in the reasoning, or result of this ingenious argument. There was no actual setting apart or appropriation of any specific fund or property of the bank, or of the drawer, for the payment of the check. * * * It (the bank) did not undertake to provide for the check by setting apart or appropriating any particular property or fund for that purpose, but by drawing a draft upon the Metropolitan Bank of New York, and remitting that draft to the Chemical Bank. * * * The learned counsel contends that the Troy Bank was agent of the Chemical Bank to receive payment of the check. Suppose it were, what did it receive as such payment? Simply its own obligation. If anything was set apart by charging up the check, it was only so much of the bank's indebtedness to its depositor. * * * To make this case analogous it would be necessary to show that the Troy Bank had separated from its general assets, and placed in the hands of some depositary, a sum sufficient to pay the check, for the express purpose of being so applied, and that this fund had come to the hands of the receiver in some form. There is no approach in this case to any such state of facts" (pp. 272, 273, 274).

(e) Breach of trust by the bank cannot, of itself, constitute a basis for a preferred claim.

Assuming for discussion only, that the bank was guilty of breach of trust in failing to purchase the

bonds, and was guilty of improper conduct in charging Brinson's deposit account, and in advising him that the bonds had been ordered when they had not been ordered, nevertheless such misconduct can not constitute the basis of a preferred claim unless the other elements of augmentation, and tracing the trust *res* to the receiver, also exist. As a matter of fact, most preferred claims are based upon some form of breach of trust. In the case of Harry Fagan, Receiver of the *First National Bank of Avon Park, Fla.*, v. *Bemory P. Whidden and William O. Jones, Co-Executors,* (U. S. C. C. A., 5th Circuit, No. 6467, decided March 26, 1932, — Fed. (2) —), the national bank falsely and fraudulently stated to the repersentatives of a depositor that the depositor did not have an account at the bank. The existence of the deposit was not discovered until after the bank had closed. Allowance of preferred claim was denied, and in disposing of the case the Court said:

> "That the officers of the bank have acted badly, and that for the damage caused by their fraudulent conduct they may be held personally to account, goes without saying. *It is quite another thing, however, to say that the fraud of an officer of the bank, by which a depositor is prevented from carrying out a purpose to cease being a creditor of the bank converts him from a creditor of the bank into an owner of a specific amount of the bank's funds so that thereafter the bank is, as to that amount, not his debtor, but his trustee.* • • • (Italics inserted.)

> "But this is not to hold that equity will, because a fraud has been committed either by concealing the existence of a deposit or the condition of the bank, set up, in order to enforce it, an agreement for a change from a general to a special deposit which was not in fact made. * * *"

In the case of *Schuyler v. Littlefield, supra,* certain brokers obtained stock from the preferred claimant by fraudulent representations. The brokers sold the stock, and the owners attempted to establish a preferred claim against the bankruptcy estate of the brokers. In upholding the judgment of the lower court denying a preferred claim, this Honorable Court said as to the obligation upon the preferred claimant:

> "Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock their claim must fail. If their evidence left the matter of identification in doubt the doubt must be resolved in favor of the trustee, who represents all of the creditors of Brown & Co., some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund" (p. 713).

To the same effect see *Cunningham, Trustee of Ponzi,* v. *Brown, supra; St. Louis & S. F. R. R.* v. *Spiller, supra; Empire State Surety Company* v. *Carroll County, supra.*

VI.

Conclusion.

It is believed that the foregoing discussion indicates that no express trust arose in the present case; that no implied or constructive trust arose; that, assuming a trust was created, no augmentation of the bank's assets occurred, and no trust res can be traced to the assets acquired by the receiver; that the lower court's ruling is directly contrary to the view prevailing in the Federal Courts; and that an affirmance may be construed to mean the overruling of the great body of Federal decisions requiring the existence of a trust res and the tracing of the same to the receiver.

It may well be doubted that there is a sound basis for allowing any preferred claims against insolvent national banks in receivership other than those permitted to the United States by express statutory provision (*supra*, page 8). Certainly it would appear to have been the intention of Congress that all other creditors should share upon a pro rata basis in the distribution of assets. *Cook County National Bank* v. *United States*, 107 U. S. 445-450 (quotation, *supra*, page 8); *Davis* v. *Elmira Savings Bank*, 161 U. S. 275. It would appear to be an entirely artificial, rather than a practical distinction, to differentiate between the status of general creditors who deposit their money with a bank, and others who, while they may not leave their funds on general deposit, nevertheless deliver to the bank their funds, or items representing funds, for some special purpose involving the handling and disburse-

ment by the bank of such funds. Such special depositor relies upon the credit of the bank just as much as does the general depositor, and undoubtedly contemplates, as a practical matter of everyday banking custom, that the funds on special deposit will be commingled by the bank with its other funds. It is not expected by such special depositor, in the absence of express provision to the contrary, that the identical funds left by him will be disbursed or remitted by the bank (see general discussion by Mr. Justice Stone, Vol. 21, Columbia Law Review, June, 1921, pages 507-525). The basis for dealing with the bank in each case being identical, to wit: the credit and reliability of the bank, it would seem only just that the special depositor should have no preference over the general depositor, particularly in view of the fact that were it not for the support furnished by the general depositor the bank could not function and could not render the special services desired by the special depositor. Thus, that learned scholar, F. W. Maitland, has said (Maitland, Equity, p. 175):

> "I have great doubts of the convenience of all this. It may be hard that a *cestui que* trust should not have 'his' property, but it is also hard that creditors should go unpaid. Courts of equity, which in this matter have had the upper hand, have thought a great deal of the *cestui que* trust, much less of creditors."

It is seriously suggested that it would not be inappropriate for this Court, at this time, to lay down the

principle that there shall be no preferred claims against national banks under existing law.

It is submitted that the decision of the lower court should be reversed.

Respectfully submitted,

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APPENDIX.

I.

Decisions in the Federal courts wherein actual augmentation (as distinguished from bookkeeping transfers) was required.

Second Circuit:

American Can Co. v. *Williams*, 176 Fed. 816 (C. C.-N. Y.-1908), affirmed in 178 Fed. 420 (C. C. A.-2-1910).

Fifth Circuit:

Merchants & Farmers Bank v. *Austin*, 48 Fed. 25 (C. C.-Ala.-1891);

Anheuser-Busch Brewing Assn. v. *Clayton*, 56 Fed. 759 (C. C. A.-5-1893);

City of Miami v. *First National Bank of St. Petersburg*, 50 F. (2) 267 (D. C.-Fla.-1931);

Larabee Flour Mills Co. v. *First Nat. Bk. of Dublin*, 52 F. (2) 146 (D. C.-Ga.-1931).

Sixth Circuit:

Brennan v. *Tillinghast*, 201 Fed. 609-612, 613.

Eighth Circuit:

Beard v. *Independent District of Pella City*, 88 Fed. 375 (C. C. A.-8-1898), affirming 83 Fed. 5;

Lucas County v. *Jamison*, 170 Fed. 338 (C. C.-Ia.-1908);

Mechanics & Metals Nat. Bk. v. *Buchanan*, 12 F. (2) 891 (C. C. A.-8-1926), cert. den. 273 U. S. 715 (1926);

Larabee Flour Mills v. *First Nat. Bk. of Henryetta, Okla.*, 13 F. (2) 330 (C. C. A.-8-1926), cert. den. 273 U. S. 727 (1926);

Rorebeck v. *Benedict Flour & Feed Co.*, 26 F. (2) 440 (C. C. A.-8-1928);
Burnes Nat. Bk. of St. Joseph, Mo. v. *Spurway*; 28 F. (2) 40 (D. C.-Ia.-1928);
Steele Briggs Seed Co. v. *Spurway*, 28 F. (2) 42 (D. C.-Ia.-1928);
Mark v. *Westlin*, 48 F. (2) 609 (D. C.-Minn.-1931).

Ninth Circuit:

Nyssa Arcadia Drainage Dist. v. *First Nat. Bk. of Vale*, 3 F. (2) 648 (D. C.-Ore.-1925).
Titlow v. *McCormick*, 236 Fed. 209.

Tenth Circuit:

Blumenfeld v. *Bank*, 38 Fed. (2) 455.

II.

Decisions in the State courts wherein actual augmentation (as distinguished from bookkeeping transfers) was required.

Massachusetts:

Hecker-Jones-Jewell Milling Co. v. *Cosmopolitan Trust Co.*, 136 N. E. 333 (1922).

Michigan:

Sherwood v. *Milford State Bank*, 53 N. W. 923 (1892);
Sunderlin v. *Mecosta County Sav. Bk.*, 74 N. W. 478 (1898).

New Jersey:

Perth Amboy Gaslight Co. v. *Middlesex County Bank*, 45 Atl. 704 (1900).

New York:

People v. *Merchants & Mechanics Bank of Troy*, 78 N. Y. 269 (1879);
Frank v. *Bingham*, 12 N. Y. S. 767 (1891).
(*People* v. *City Bank of Rochester*, 96 N. Y. 32 (1884), seems to be disapproved of, and *In re Jayne & Mason*, 251 N. Y. S. 768 (1931), seems to be based on a statute).

Pennsylvania:

Freiberg v. *Stoddart*, 161 Pa. 259 (1894);
Commonwealth ex rel. v. *State Bank of Pittsburgh*, 216 Pa. 124 (1906).

South Carolina:

Citizens Bank of Pinewood v. *Bradley*, 134 S. E. 510 (1926);
Ex parte Wachovia Bk. & Tr. Co., 158 S. E. 214 (1931).

South Dakota:

Hornick, More & Porterfield v. *Farmers & Merchants Bk.*, 227 N. W. 375 (1929);
Milligan v. *First State Bk. of Barnard*, 226 N. W. 747 (1929).

Washington:

Zimmerli v. *Northern Bk. & Tr. Co.*, 191 Pac. 788 (1920);
But compare *Northwest Lbr. Co.* v. *Scandinavian-American Bk. of Seattle*, 225 Pac. 825 (Wash.-1924).

III.

Decisions in the Federal courts involving the mingling of trust funds with balances in correspondent banks, insisting upon specific following and negativing any idea of a general lien.

Second Circuit:

American Can Co. v. *Williams*, 176 Fed. 816 (C. C.-N. Y.-1908), affirmed in 178 Fed. 420 (C. C. A.-2-1910).

Fourth Circuit:

Marshburn v. *Williams*, 15 F. (2) 589 (D. C.-N. C.-1926);
Ellerbe v. *Studebaker Corporation of America*, 21 F. (2) 993 (C. C. A.-4-1927).

Fifth Circuit:

Clark Sparks & Sons Mule & Horse Co. v. *Americus Nat. Bk.*, 230 Fed. 738 (D. C.-Ga.-1916);
Washington Loan & Banking Co. v. *Fourth Nat. Bk. of Macon*, 38 F. (2) 772 (C. C. A.-5-1930);
Sanders v. *Stevens*, 51 F. (2) 743 (D. C.-Miss.-1931).

Sixth Circuit:

Board of Commissioners of Crawford County v. *Patterson*, 149 Fed. 229 (C. C.-Ohio-1906), affirmed in *same* v. *Strawn*, 157 Fed. 49 (C. C. A.-6-1907);
Brennan v. *Tillinghast*, 201 Fed. 609 (C. C. A.-6-1913).

Eighth Circuit:

Lucas County v. *Jamison*, 170 Fed. 338 (C. C.-Ia.-1908);
Macy v. *Roedenbeck*, 227 Fed. 346 (C. C. A.-8-1915);
State Bank of Winfield v. *Alva Security Bk.*, 232 Fed. 847 (C. C. A.-8-1916);
Dudley v. *Richards*, 18 F. (2) 876 (C. C. A.-8-1927);
Bartholf v. *Millett*, 22 F. (2) 538 (C. C. A.-8-1927);
Gwynn v. *Spurway*, 28 F. (2) 37 (D. C.-Ia.-1928);
Cuttell v. *Fluent*, 51 F. (2) 974 (C. C. A.-8-1931).

Ninth Circuit:

Titlow v. *McCormick*, 236 Fed. 209 (C. C. A.-9-1916);
United States Nat. Bk. of Centralia v. *City of Centralia*, 240 Fed. 93 (C. C. A.-9-1917), cert. den. sub. nom. *City of Centralia* v. *Titlow*, 243 U. S. 656 (1917);
First Nat. Bk. of Forsyth v. *Fidelity & Deposit Co.*, 48 F. (2) 585 (C. C. A.-9-1931).

Tenth Circuit:

Anadarko Cotton Oil Co. v. *Litteer*, 300 Fed. 222 (D. C.-Okla.-1924);
Dickson v. *First Nat. Bk. of Buffalo, Okla.*, 26 F. (2) 411 (C. C. A.-8-1928).